(2)

No. 09-7

IN THE

Supreme Court of the United States

JAMES STEVENS,

Petitioner,

v.

VONS COMPANIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR REHEARING

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QUESTION PRESENTED

Whether the State of California is thwarting proper constitutional analysis of punitive damages by maintaining and applying its own separate test to assess such damages, when the test (1) substantively alters the criteria articulated in United States Supreme Court decisions as the measures by which punitive damages need be evaluated, and (2) substitutes "abuse of discretion" instead of "de novo" as the standard of review. (3)Does this "abuse of discretion" violate the 7th and 14th amendments' guarantee of due process? (4) What happens to justice in America when the federal court of last resort (United States Supreme Court) refuses to review a case that is the product of denied constitutional rights as it progressed through the judicial system as the loss of these constitutional rights are ratified by the appeals court and the California Supreme Court and ultimately the United States Supreme Court should they exercise its judicial discretion and not review this writ of certiorari?

STATEMENT OF THE CASE

The following information was not included in the previous brief filed with the United States Supreme Court. Without this information the court will not be able to make a fair and just ruling. The concept that the trial judge is there to ensure that both sides receive a fair trial is further enhanced by the notion that the judge is the 13th juror. The trial judge has the benefit of reviewing evidence that was presented outside the jurors' presence and was not admitted as evidence as ruled by the court.

The court refused to admit Vons' own internal investigation by Human Resources, which revealed 6 witnesses who corroborated my claims of sexual harassment (I was subsequently transferred and told by HR that my claims could not be substantiated!) What was the court's motivation to limit the introduction of this crucial ("smoking gun") evidence? I mailed certified letters to Steve Burd, the C.E.O. of Safeway, Tom Keller, the president of Vons, the manager of HR Deborah Conrad, and to 7 of the board members, James H. Greene, Paul Hazen, Hector Ley Lopez, Robert I. MacDonnell, George R. Roberts, Rebecca A. Stirn, William Y. Tauscher, and asking for relief from the sexual harassment and retaliatory actions by management; consequently Safeway/Vons could not claim the absence of actual or constructive knowledge and could not use "the managing agent" theory as a defense. My transfer and subsequent termination occurred after the signed and dated certified proof of delivery of these letters.

A side bar note: the court appeared most annoyed that 8 of the jurors were present for the hearing on the motion from Vons for a Judgment Notwithstanding the Verdict and the motion for a new trial. During the hearing the

court said on the record that it "did not like my case and had trouble with the jury's verdict," but also said that it "would stop commenting further while it was ahead," suggesting that the court had more to say regarding its negative feelings towards me! Whatever it was that the court chose not to utter was made abundantly clear by its ruling to reduce compensatory damages and punitive damages, then threatening me with a new trial unless I accepted the reduced award! The Remittitur optioned by the court suggests that Vons did receive a fair trial; but a new trial would be ordered if I did not agree to the reduced amount. The alternative is that I did not somehow receive a fair trial even though I was awarded $18.4 million and therefore a new trial would be ordered unless I accepted a reduced award. At this point my attorneys advised me that if I did not accept the $1.2 million and a new trial is ordered, I would not win the second time because the same judge would preside over the retrial. This option is shrouded in court-approved "blackmail."

The court cited *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003) to justify reducing the punitive award; but not all elements of the case were applied, thereby inferring that it is possible to be "a little bit pregnant" or that it is possible to commit a "little murder". The court awarded Vons a tremendous discount by not guaranteeing or safeguarding constitutional limits on punitive damages. The court stated that the "jury was influenced by passion and prejudices" because they returned a punitive award more than the $10 million sought by counsel -or- 6 times the compensatory damages. The jury was anything but passionate and prejudicial. In fact they were thoughtful and methodical, deliberating long enough to review prior testimony in order to determine the defendant's financial position, as opposed to selecting

an arbitrary or inflated number. These actions demonstrated that the jury followed the jury instructions to arrive at a number that will deter a company but not put them out of business; however, a jury would have difficulty determining an appropriate dollar amount without evidence of a company's wealth. This is not the result of passion but instead the work of an intelligent and diligent jury. Considering that the jury was comprised of, but not limited to an attorney, assistant district attorney, an author, a bank executive, a human resources manager, and a military police sergeant; there leaves little room for passion and prejudice. Had the jury been passionate and prejudicial, they would have found all causes of action in my favor; but they not. It should be expressly noted that jury's verdict was unanimous! We, as Americans expecting equality before the law are left to ponder as to what the court's personal feelings were and how those feelings influenced the court's ruling. Could it explain why the court only applied a portion of the case cited in its ruling, *State Farm Mutual Insurance Co. v. Campbell* or was it an inadvertent misinterpretation? The trial court's stating that there is an element of punitive damages included in the jury's award of compensatory is misplaced as it does not allow for a consideration of the wealth of the company, coupled by precluding a separate trial for punitive damages determination. It should be noted that 4 of the Vons employees who testified for the plaintiff have been creatively retaliated against, including but not limited to demotions and undesirable transfers 25+ miles from their current location.

Also during the hearing the court stated it did not appear to the court that I was severely damaged as a result of harassment from a woman!

The court ruled 90% in favor of the defense's motions, leaving 10% in favor of the plaintiff. Of the 10% favorable motions for the plaintiff, the court would offer an apology to the defense; however no apology to the plaintiff for the 90% motions rules against them. Nathan Goldberg was asked why the court is appearing biased against the plaintiff. His response was yes, it appears so; however, do not despair, because these favorable rulings for the defense will help us during the appeal process as Vons cannot claim an unfair trial because the court has ruled in their favor 9 times out of 10. I disagreed because it was my understanding that the court was to be neutral and objective while fulfilling the court's role of ensuring a fair trial for both plaintiff and the defense.

During deliberation, the jury asked if there would be a separate trial for punitive damages. Michael Bononi, lead counsel for the defense was obviously upset fearing that the jury had ruled in my favor, used profanity in open court and on the record. He also asked the court to dip the answer in cyanide before returning it to the jury room. The court did not admonish Mr. Bononi's inappropriate profanity nor did it comment on his disrespect for the court and the odd request to poison the jurors! Mr. Bononi did not apologize to the court. Ironically Nathan Goldberg, lead attorney for plaintiff, raised his voice when Vons asked that their own internal investigation into my complaint of sexual harassment be excluded as evidence; the court granted the defense's motion. In response to Mr. Goldberg's outburst, the court said, "I don't know how the courts operate in Los Angeles, but in Simi Valley we have 'class!'" Mr. Goldberg graciously apologized to the court.

The reduction of compensatory damages by $500,000 was inconsistent with case law in that it does only require physical harm as a prerequisite to justify an acceptable compensatory awards; thereby refuting a claim of excessiveness by the court . Before I was transferred I experienced many bouts with stress and anxiety that required over 15 visits to the emergency room with symptoms of a heart attack. My doctor warned me that if I did not change the stress in my life I would suffer an actual heart attack. The court minimizing the emotional distress that I experienced due to the sexual harassment, transfer and subsequent termination that caused me to contemplate suicide, is as offensive as it is contradictory. The court did agree, however that as a result of my termination and the emotional distress that followed, I stopped functioning as a productive member of society, became withdrawn and saw my marriage of 25 years and family fall apart which included a 2 year daughter and a 10 year old son.

A listening device was found in my home by a private investigator and reported to the police and the FBI, which was a serious security threat and unconscionable violation of privacy. These facts were not admitted into evidence; a serious violation of due process.

Vons/ Safeway suffered no consequences for misrepresenting and lying to state and Federal government agencies (The Department of Fair Employment and Housing, and the Equal Employment Opportunity Commission respectively). Their behavior is being tolerated and even rewarded, by allowing Vons to escape with a slap on the wrist with a punitive damage award of $ 1.2 million. For a company that generates annual sales of $7 billion, it is tantamount to an insignificant 'cost of doing business,'

and definitely not a deterrent of reprehensible behavior for which punitive damages award are designed.

In my case for sexual harassment and retaliation in violation of California's Fair Employment & Housing Act, I, the plaintiff James Stevens – Petitioner herein – won a compensatory damages award of $1,672,988 and a punitive damages award of $16,729,880 from a jury in the Superior Court of Ventura County. See Pet. App. 12a-13a. After the trial court reduced each award to $1.2 million on remittitur (Pet. App. 39a), defendant Vons appealed, and I filed a cross-appeal with respect to the reduction of punitive damages.

On appeal, I the petitioner argued that the punitive damages awarded by the jury, in a 10-to-1 ratio to compensatory damages, fell "within the maximum constitutionally permissible award" and asked that the jury award "be reinstated, or, in the alternative, [that] the punitive damages award . . . be increased to the absolute constitutional maximum." See Pet. App. 27a.

In support of my argument, I relied on United States Supreme Court pronouncements on the constitutionality of punitive damage awards, as incorporated into the California Supreme Court's decision in *Simon v. San Paolo U.S. Holding Co.*, 35 Cal.4th 1159 (2005). See Pet. Att. 27a. The California Court of Appeal for the Second Appellate District, Division Six, however, rejected that line of analysis without explanation.

Punitive damages in California are assessed by different criteria under *Neal* than they are under this Court's decisions. *Neal* considers a defendant's wealth or financial condition to be an "essential factor" in punitive damages analysis but takes no account of civil penalties as

a measure of comparison, as required by *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583 (1996), and its progeny. In addition, *Neal* allows an abuse of discretion standard to govern punitive damages analysis, even though cases since *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), have made clear that de novo review is warranted whenever courts are determining the constitutionality of punitive damages.

REASONS FOR GRANTING THE PETITION

Ever since decisions of this Court started lending punitive damage awards a constitutional dimension by considering excessiveness to be a Due Process violation, cases in California have suffered a lack of uniformity and certainty, given that two separate and conflicting standards – one state, one federal – have emerged with regard to the assessment of punitive damages. One line of analysis, following *Neal*, 21 Cal.3d 910, determines excessiveness under state law, while another probes constitutionality under federal law, as articulated by *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and its predecessors, *BMW*, 517 U.S. 559, and *Cooper Industries*, 532 U.S. 424.

In the present case, a jury awarded me the petitioner punitive damages in a 10-to-1 ratio to compensatory damages for suffering sexual harassment and retaliation in the workplace. Although this ratio implicated constitutional limits, the appellate court discarded due process analysis and chose to proceed solely under *Neal*, ruling – without explanation – that it was the governing standard.

This Court should grant certiorari to determine whether California is thwarting proper constitutional analysis of punitive damages by applying its own separate test to assess such damages, when the test (1) substantively alters the criteria articulated in United States Supreme Court decisions as the measures by which punitive damages need be evaluated, and (2) substitutes "abuse of discretion" instead of "de novo" as the standard of review.

I.

CALIFORNIA STANDARDS ASSESSING THE EXCESSIVENESS OF PUNITIVE DAMAGES CONFLICT WITH THIS COURT'S STANDARDS ASSESSING THEIR CONSTITUTIONALITY.

With regard to punitive damages, California cases confront two conflicting – and unreconciled – sets of standards. One line of analysis, under the leading case of *Neal*, 21 Cal.3d 910, assesses the "excessiveness" of punitive damages as a matter of state law. A second line of analysis, under *Simon*, 35 Cal.4th 1159 (2005), determines whether they are excessive under the federal Constitution's due process protections set forth "in a series of [United States Supreme Court] decisions culminating in *State Farm*." *Id.* at 1171. In the present case, the appellate court opted to proceed under *Neal* to uphold a reduction of punitive damages, whereas federal cases like *State Farm* would have dictated a contrary result – that is, affirmance of the jury's original award.

California law considers the "excessiveness" of punitive damages. Courts determine whether an award "as a matter of law *appears* excessive" or if "the recovery is so grossly disproportionate as to raise a presumption that it is the

result of passion or prejudice." *Neal*, 21 Cal.3d at 928 (emphasis added). Judging excessiveness based on appearance is a tenuous proposition, and the California Supreme Court itself has recognized that "the determination of whether an award is excessive is admittedly more art than science." *Adams v. Murakami*, 54 Cal.3d 105, 112 (1991).

Federal analysis articulates a different question – whether the "imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited" as violative of due process protections. *Simon*, 35 Cal.4th at 1171. A "grossly excessive" punitive damages award, as this Court has ruled, "constitutes an arbitrary deprivation of property" in violation of the Fourteenth Amendment. *State Farm*, 538 U.S. at 416-417.

In the present case, even though a punitive damages award with a 10-to-1 ratio was under examination, the appellate court declined to conduct a federal due process analysis, insisting that Petitioner's reliance on *Simon* – and its application of *State Farm*'s dictates – was "misplaced." See Pet. App. 27a. Rather, the appellate court insisted that "[t]he controlling authority for excessiveness under California law is *Neal*." See Pet. App. 28a. There was no attempt to explain why one standard was being discounted for another, even though an alternate choice would alter the analysis – and the ultimate result.

A. California Considers a Defendant's Wealth, a Criterion This Court Disapproves in Favor of Using Civil Penalties as a Measure of Comparison.

Substantive state and federal guidelines as to what factors are considered in assessing punitive damages differ. *Neal* dictates that a reviewing court examine the

reprehensibility of the conduct involved, the relationship between the compensatory and punitive damages, and "the wealth of the particular defendant." 21 Cal. 3d at 928. *Neal* recognizes that "the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Id.* at 928. In fact, *Simon* interprets *Neal* to emphasize that "the defendant's financial condition is an essential factor in fixing an amount that is sufficient" to serve the goal of deterrence "without exceeding the necessary level of punishment." 35 Cal.4th at 1185.

This "essential factor" of the defendant's wealth, however, is not even figured into the federal calculus as articulated by *Simon* (citing precedent from this Court). This Court has actually been troubled by the fact that "the preservation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417.

An unresolved tension exists, then, between these two lines of analysis, with no clear demarcation as to which applies to a given case and how that determination is made. *Simon* limits its discussion "only to the federal constitutional question, not any issue of excessiveness under California law" (35 Cal.4th at 1167), without offering a rationale as to the inapplicability of the *Neal* standard.

It is doubtful that *Neal* itself would pass constitutional muster today, given that its 74-to-1 punitive-to-compensatory damages ratio (21 Cal.3d at 920, 927) would be unlikely to survive scrutiny under federal due process. Therefore, it seems to serve as an anomalous basis for declaring a 10-to-1 ratio excessive without engaging in any

constitutional analysis. After all, the measure of punitive damages in Petitioner's case under a constitutional standard would have led to a different result – given that punitive damages awards that do not exceed a single-digit ratio "to a significant degree" are likely to fall within constitutionally permissible limits. *State Farm*, 538 U.S. at 425.

II.

THIS COURT'S MANDATE THAT CONSTITUTIONAL REVIEW OF SUCH DAMAGES BE "DE NOVO."

Differing state and federal standards governing the review of punitive damages yield incongruent results, since cases like *Cooper Industries* have made clear that constitutional analyses of punitive damages require independent de novo review, yet California cases under *Neal* follow a deferential abuse of discretion standard – the standard that was followed.

That constitutional issues pertaining to punitive damages merited de novo review was established, in no uncertain terms, in *Cooper Industries*, 532 U.S. at 431.

Of utmost importance, *Cooper Industries* pointed out that independent appellate review could likely lead to a different outcome in a case. *Id.* at 441. Despite that practical, real world effect, the California Supreme Court sanctions the continued review of cases pursuant to an abuse of discretion standard. It let stand the appellate court's assessment of Petitioner's case under an abuse of discretion standard, even though the punitive damages awarded to him in a 10-to-1 ratio implicated de novo constitutional analysis.

Indeed, even as it establishes that "[t]he requirement of independent review applies to state as well as federal appellate courts when assessing excessiveness under the federal due process clause," the California Supreme Court concedes in *Simon* that "when no federal due process is involved, as when awards are reviewed for excessiveness under *state* law, the high court's decisions do not forbid greater deference to jury verdicts or trial court judgments." 35 Cal.4th at 1172, fn. 2. *Neal* indicates, for example, that the standard for reviewing trial court reductions of punitive damages becomes abuse of discretion.

III.

NEAL'S INCONSISTENCY WITH THIS COURT'S PRONOUNCEMENTS CONFUSES THE ROLE OF APPELLATE COURTS IN REVIEWING PUNITIVE DAMAGES.

The varying standards of review applicable to the assessment of punitive damages in California – de novo under this Court's pronouncement in *Cooper Industries* and subsequent cases; abuse of discretion under the California Supreme Court's *Neal* decision – create confusion as to the role of appellate courts reviewing those damages.

In reviewing for abuse of discretion, the appellate court gives deference to the trial court, which, when ruling on punitive damages, "sits not in an appellate capacity, but as an independent trier of fact" – or a 13th juror. *Neal*, 21 Cal.3d at 933. The appellate court in this case subscribed to that deferential view, adopting *Neal*'s dictate that the trial judge's order "not be reversed unless it plainly appears that he abused his discretion." See Pet. App. 28a.

A far more active role is contemplated for appellate courts under de novo review of constitutional excessiveness – "a legal issue appellate courts determine independently." *Simon*, 35 Cal.4th at 1187. *Simon* itself, however, undercuts that broad pronouncement by requiring an appellate court to "keep in mind . . . that its constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view." *Id.* at 1188. "In enforcing federal due process limits, an appellate court *does not sit as a replacement for the jury* but only as a check on arbitrary awards." *Id.* at 1188 (emphasis added).

CONCLUSION

Despite several rulings from this Court regarding proper constitutional analysis of punitive damages, the California Supreme Court retains an alternate test, which utilizes different substantive criteria, adheres to a deferential standard of review, and is incorrectly applied to cases, including Petitioner's, yielding inconsistent results. This Court is respectfully asked to grant certiorari to resolve a key conflict between its rulings and those of the California Supreme Court in order to promote uniformity and consistency in an important area of law, punitive damages.

Dated: October 30, 2009

Respectfully submitted,

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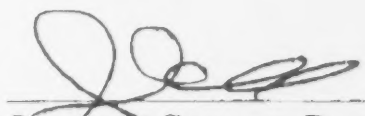
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



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